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Aim High Investment Group, LLC*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

AIM HIGH INVESTMENT
GROUP, LLC,
Plaintiff/Counter-Defendant,
v.
SPECTRUM LABORATORIES,
LLC,
Defendant/Counterclaimant. } Case:
} PLAINTIFF'S NOTICE OF
} MOTION AND MOTION TO
} COMPEL RESPONSES TO
} SUBPOENAS DUCES TECUM

Pursuant to Federal Rule of Civil Procedure 45(d)(2)(B)(i), Plaintiff AIM HIGH INVESTMENT GROUP, LLC (“Plaintiff”) hereby seeks an order compelling a response to its subpoenas duces tecum served upon Element Santa Fe Springs (“Element”) and S & N Labs (“S & N”) concerning their testing of Plaintiff’s laboratory made urine product sold under the name “XStream” that is at issue in this litigation.

1 This Motion is made and based upon the Memorandum of Points and
2 Authorities below, the Declaration of Plaintiff's attorney, Ryan Gile, Esq., attached
3 hereto as **Exhibit 1** ("Gile Decl."), as well as the papers and pleadings on file, and
4 the arguments of counsel at the hearing on this Motion. This motion is made
5 following the conference of counsel pursuant to L.R. 7-3 which took place on June
6 10, 2022.
7

8
9 Dated: July 20, 2022

10 Respectfully Submitted,

11 **FISHERBROYLES, LLP**

12
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31 *Aim High Investment Group, LLC*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The litigation giving rise to this motion is a declaratory relief action (re: patent invalidity and non-infringement) pending in the United States District Court for the District of Nevada, *Aim High Investment Group, LLC v. Spectrum Laboratories, LLC*, Case No. 2:22-cv-00158-GMN-DJA (the “Nevada Action”) filed on January 28, 2022.

In pre-litigation correspondence, Defendant Spectrum Laboratories, LLC (“Spectrum”) voluntarily disclosed laboratory test results from Element and S & N to Plaintiff’s counsel regarding Plaintiff’s laboratory-made urine product *XStream*, purporting to demonstrate Plaintiff’s infringement of Spectrum’s U.S. Patent Nos. 7,192,776 and 9,128,105 (the “Patents-in-Suit”). On May 13, 2022 – at the beginning of discovery in this matter – Spectrum expressly referenced the Element lab report as a document Spectrum was relying upon to support its claims. On May 13 and May 16, 2022, Plaintiff served a *subpoena duces tecum* on Element and S & N, respectively, seeking all documents and communications regarding their testing of Plaintiff’s *XStream* product. Prior to this date, Spectrum’s counsel had never indicated that it was representing either Element or S & N. Conveniently, however, following Plaintiff’s service of third-party subpoenas on Element and S & N, both Element and S & N, *by and through Spectrum’s own counsel*, have objected to

1 Plaintiff's subpoenas and are refusing to produce *any* documentation unless and until
 2 these labs are disclosed as experts in this case. For the reasons described herein, the
 3 discovery sought by Plaintiff's subpoenas are relevant and narrowly tailored and
 4 both Element and S & N should be ordered by this Court to comply.
 5

6 **II. FACTUAL BACKGROUND**

7 1. On January 8, 2021, Spectrum disclosed to Plaintiff's counsel
 8 laboratory test results from S & N regarding Plaintiff's *XStream* product, purporting
 9 to demonstrate Plaintiff's infringement of the Patents-in-Suit. *See Exhibit 1*, Gile
 10 Decl., at ¶ 2; *see also Exhibit 2* attached hereto.¹
 11

12 2. On October 11, 2021, Spectrum also disclosed to Plaintiff's counsel
 13 laboratory test results from a second lab, Element, again regarding Plaintiff's
 14 *XStream* product, purporting to further demonstrate Plaintiff's infringement of the
 15 Patents-in-Suit. *Id.*, at ¶ 3; *see also Exhibit 3* attached hereto.²
 16

17 3. On January 28, 2022, Plaintiff filed the Complaint in the Nevada
 18 Action, seeking *inter alia* a declaratory judgment of non-infringement as it relates
 19 to its *XStream* product and the Patents-in-Suit. *Id.*, at ¶ 4.
 20

21 4. Pursuant to the stipulated scheduling order in the Nevada Action, the
 22 discovery cut-off is February 1, 2023.
 23

24
 25
 26 ¹ Exhibit 2 hereto was filed by Defendant without any request to seal in the Nevada Action and, although
 27 marked confidential, is no longer confidential.
 28

² Exhibit 3 hereto was filed by Defendant without any request to seal in the Nevada Action and, although
 marked confidential, is no longer confidential.

1 5. On May 16, 2022, Plaintiff served a subpoena duces tecum on Element
2 Santa Fe Springs of Santa Fe, California (“Element”) seeking all documents and
3 communications regarding their testing of Plaintiff’s *XStream* product. *Id.*, at ¶ 6;
4
5 *see also* **Exhibit 4** attached hereto.

6 6. On May 27, 2022, Element served an objection letter by and through
7 counsel also representing Defendant Spectrum in the Nevada Action. *Id.*, at ¶ 7; *see*
8
9 *also* **Exhibit 5** attached hereto.

10 7. Element’s position is that it is a non-testifying, consulting expert
11 protected from discovery under Fed. R. Civ. P. 26(b)(4). *Id.*, at ¶ 8.

12 8. On May 31, 2022, Plaintiff’s counsel responded to Element’s
13 objections and requested that the parties meet and confer to discuss the discovery
14 dispute. *Id.*, at ¶ 9; *see also* **Exhibit 6** attached hereto.

15 9. Notably, on May 13, 2022, Spectrum listed the Element report in their
16 initial disclosures. *Id.*, at ¶ 10; *see also* **Exhibit 7** attached hereto.

17 10. Likewise, on May 16, 2022, Plaintiff also served a subpoena duces
18 tecum on S & N Labs of Santa Ana, California (“S & N”) seeking all documents and
19 communications regarding their testing of Plaintiff’s *XStream* product. *Id.*, at ¶ 11;
20
21 *see also* **Exhibit 8** attached hereto.

22 11. S & N’s position is identical to Element’s, asserting that it is a non-
23 testifying, consulting expert protected from discovery under Fed. R. Civ. P. 26(b)(4).

1 *Id.*, at ¶ 12; **Exhibit 9**.

2 12. On Friday, June 10, 2022, the parties, through counsel, conducted a
3 meet and confer teleconference to discuss Plaintiff's subpoenas and both Element's
4 and S & N's objections. Despite a good faith effort, the parties could not come to a
5 resolution regarding the production of the subpoenaed information, and thus
6 necessitating this Court's intervention and the filing of this Motion.³ *Id.*, at ¶¶ 13-
7 8
9 15.

10 **III. LEGAL ARGUMENT**

11 **A. Legal Standard**

12 Federal Rule of Civil Procedure 45 governs subpoenas. Rule 45 provides that
13 a party may command a non-party to produce documents in that person's possession,
14 custody, or control by way of a subpoena. Fed. R. Civ. P. 45(a)(1)(A)(iii). The scope
15 of discovery under a subpoena issued pursuant to Rule 45 is the same as the scope
16 of discovery allowed under Rule 26(b)(1). Rule 26(b)(1) allows a party to obtain
17 information that is relevant to any claim or defense, proportional to the needs of the
18 case, and non-privileged. Fed. R. Civ. P. 26(b)(1). A party resisting discovery may,
19 however, serve objections to the subpoena. Fed. R. Civ. P. 45(d)(2)(B). The party
20 seeking discovery may then move for an order compelling production of the
21 documents sought. Fed. R. Civ. P. 45(d)(2)(B)(i). The court may order the person to
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27 ³ On June 24, 2022, Plaintiff filed a Motion to Compel Responses to these Subpoenas Duces Tecum in the Nevada
28 District Court. Plaintiff intends to withdraw that Motion in favor of filing the Motion in the Central District of California based on the location of the subpoenaed third parties at issue.

1 comply with the subpoena but must protect a non-party from significant expense
 2 resulting from compliance. Fed. R. Civ. P. 45(d)(2)(B)(ii). The Federal Rules of
 3 Civil Procedure give district courts broad discretion to manage the manner in which
 4 discovery proceeds. *Applied Materials, Inc. v. Advanced Micro-Fabrication Equip.*
 5 (*Shanghai*) Co., Ltd., No. C 07-5248 JW (PVT), 2008 WL 183520, at *1 (N.D. Cal.
 6 Jan. 18, 2008).

9 A motion to compel is entrusted to the sound discretion of the district court,
 10 and its rulings with regard to discovery are reversed only upon a clear showing of
 11 an abuse of discretion. *See Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002)
 12 (“[b]road discretion is vested in the trial court to permit or deny discovery”); *Cal.*
 13 *Dept. of Soc. Servs. v. Leavitt*, 523 F.3d 1025, 1031 (9th Cir. 2008) (“discovery is
 14 ordinarily reviewed for abuse of discretion”).

15 **B. Element and S & N Must Each Produce the Requested Documentation**

16 Neither Element nor S & N (nor Spectrum, for that matter) is the arbiter of
 17 Plaintiff’s discovery – that is the role of the Court. The Federal Rules of Civil
 18 Procedure expressly provide for the discovery Plaintiff is seeking, and the notion
 19 that Plaintiff must await Spectrum’s expert disclosure to obtain relevant and
 20 proportional third-party discovery from Element and/or S & N has already been
 21 rejected in this jurisdiction.

22 Delaying discovery answers would contravene the federal rules’ purpose,
 23

1 which is ‘to secure the just, speedy, and inexpensive determination of every action
2 and proceeding.’” Fed. R. Civ. P. 1.

3 Here, Plaintiff is seeking patently relevant documents, communications, and
4 information related to Spectrum’s pre-litigation laboratory testing of Plaintiff’s
5 *XStream* product. There is no dispute that Element and S & N each tested the
6 *XStream* product now at issue nor that Spectrum voluntarily disclosed the laboratory
7 test results from both Element and S & N to Plaintiff’s counsel, thereby putting the
8 so-called “non-testifying consulting expert’s” opinions, documents,
9 communications, and information at issue and, accordingly, rendering them subject
10 to discovery.

11 First, Plaintiff’s *subpoenas duces tecum* seek relevant information that is
12 otherwise proportional to the needs of this case. It is well established that the scope
13 of discovery for Rule 45 subpoenas is the same as that allowed under Rule 26.
14 *Fujikura Ltd. v. Finisar Corp.*, Case No. 15-mc-80110-HRL (JSC) (N.D. Cal. May.
15 14, 2015). Parties may obtain discovery regarding any nonprivileged matter that is
16 relevant to any party’s claim or defense and proportional to the needs of the case.
17 Fed. R. Civ. P. 26(b). And in this case, Plaintiff’s *XStream* product is at issue and
18 Spectrum voluntarily disclosed the aforementioned laboratory test results from
19 Element and S & N purporting to demonstrate Plaintiff’s patent infringement.
20 Indeed, Spectrum even listed the Element report in its initial disclosures. Moreover,
21

1 inasmuch as the Federal Rules of Civil Procedure expressly allow, provide for, and
 2 contemplate discovery from third parties such as Element and S & N, pursuant to
 3 Rule 45, the subpoena is facially proportional.
 4

5 Second, as to the litany of “General objections” raised by Element and S & N,
 6 such boilerplate objections are improper and tantamount to making no objection at
 7 all. *Moser v. Holland*, No. 2:14-CV-02188, 2016 WL 426670, at *1, 3 (E.D. Cal.
 8 Feb. 4, 2016), *Kristensen v. Credit Payment Services, Inc.*, 2014 WL 6675748, at *4
 9 (D. Nev. Nov. 25, 2014) (citing *St. Paul Reinsurance Company, Ltd. v. Commercial*
 10 *Financial Corp.*, 198 F.R.D. 508, 512 (N.D. Iowa 2000) (collecting cases and
 11 sanctioning a lawyer for using boilerplate objections in response to requests for
 12 production of documents)).
 13

14 Third, as to the position taken by Element and S & N that they are not subject
 15 to discovery because they are so-called “non-testifying, consulting experts” under
 16 Fed. R. Civ. P. 26(b)(4), it is well-established that a so-called “non-testifying
 17 consulting expert’s” opinions are discoverable if the opinions are voluntarily
 18 disclosed. *See, e.g., Atari Corp. v. Sega of Am.*, 161 F.R.D. 417, 418-20 (N.D. Cal.
 19 1994); *Lexington Luminance LLC v. Feit Elec. Co.*, No. CV 18-10513-PSG (KSx),
 20 2020 U.S. Dist. LEXIS 255931, at *28 (C.D. Cal. June 12, 2020 (“...by disclosing
 21 SEM images and EDX measurements in the FAC, Lexington put this data "at issue"
 22 and thereby waived work product protections for those materials.”). And as noted,
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1 Spectrum voluntarily disclosed both Element's and S & N's laboratory test results
 2 to Plaintiff's counsel as evidence of Plaintiff's alleged patent infringement, thereby
 3 putting the so-called "non-testifying, consulting expert's" opinions, documents,
 4 communications, and information related to Plaintiff's *XStream* product into issue
 5 and, accordingly, waiving any protections from disclosure afforded to non-testifying
 6 experts and plainly rendering them subject to discovery. Spectrum even listed the
 7 Element report as part of its initial disclosures.
 8

10 Fourth, as to Element's and S & N's "Specific Objections" #1(B), 2(B), and
 11 3(B) (i.e., that the subpoenas are "overly broad, irrelevant, unduly burdensome, and
 12 disproportionate"), Element and S & N have failed to make any showing whatsoever
 13 to sustain any of the would-be objections that are merely recited in the form of legal
 14 buzz words. The applicable Rules require a responding party to specifically detail
 15 the reasons why each request is objectionable, which they failed to do. *Moser v.*
 16 *Holland*, No. 2:14-CV-02188, 2016 WL 426670, at *1, 3 (E.D. Cal. Feb. 4, 2016);
 17 *Painters Joint Comm. v. JL Wallco, Inc.*, No. 2:10-CV-1385-JCM-PAL,
 18 2011WL5854714 (D. Nev. Nov. 21, 2011) (an objecting party must specifically
 19 detail the reasons why each request is objectionable); *Prado Guajardo v. Perez*, No.
 20 2:16-CV-00546-GMN-VCF, 2017 WL 3130420, at *2 (D. Nev. July 24, 2017)
 21 ("Boilerplate, generalized objections are inadequate and tantamount to making no
 22 objection at all."); *Mitschke v. Gosa! Trucking, Ltd.*, No. 2:14-CV-1099-JCM-VCF,
 23 27

1 2016 WL 8732417, at * 1 (D. Nev. Jan. 22, 2016) (“boilerplate objections are
 2 disfavored, ‘especially when a party fails to submit any evidentiary declarations
 3 supporting such declaration.’” (citation omitted)).
 4

5 Fifth, and lastly, there is no cognizable counterargument that Spectrum’s
 6 disclosure of the Element and S & N’s lab reports as “confidential” somehow
 7 provides an exception to the foregoing authorities compelling Element’s and S &
 8 N’s responses to Plaintiff’s subpoena. The *Atari* case cited above specifically holds
 9 that neither the confidentiality designation nor FRE 408 disclaimer provide any
 10 preservation when such work product is disclosed to the adversary. *See Atari Corp.*
 11
 12 *v. Sega of Am.*, 161 F.R.D. 417, 420 (N.D. Cal. 1994)) (“Waiver of a privilege may
 13 occur by voluntary disclosure to an adverse party during settlement negotiations,
 14 despite any agreement between the parties to keep the information confidential.”)
 15 (citing *In re Chrysler Motors Corp. v. Overnight Evaluation Program Litigation*,
 16 860 F.2d 844, 847 (8th Cir. 1988) (work product privilege of computer tape
 17 produced during settlement negotiation waived despite agreement that it was
 18 confidential work product and did not constitute a waiver); *Khandji v. Keystone*
 19 *Resorts Management, Inc.*, 140 F.R.D. 697, 699 (D. Co. 1992); *Chubb Integrated*
 20 *Systems Ltd. v. National Bank*, 103 F.R.D. 52, 67 (D.D.C. 1984); *Grumman*
 21 *Aerospace Corp. v. Titanium Metals Corp. of Amer.*, 91 F.R.D. 84, 90 (E.D.N.Y.
 22 1981)). As these authorities make clear, the purpose of the work-product protection
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1 for non-testifying, consulting experts is to keep the information exchanged by and
2 between the party and its consultant out of the hands of the adversary pending
3 litigation, and there is no longer any basis for that protection once it is disclosed to
4 said adversary, as in this case.
5

6 **IV. CONCLUSION**

7 Based upon the foregoing, Plaintiff respectfully requests a) an order
8 compelling a response to its subpoena duces tecum served upon Element Santa Fe
9 Springs seeking Element's documents, communications, and information related to
10 the Element Job No. 249067 in which Element conducted the testing of the *XStream*
11 product at issue or b) an order compelling a response to its subpoena duces tecum
12 served upon S & N seeking S & N's documents, communications, and information
13 related to the S & N Job No. 23977 in which S & N conducted the testing of the
14 *XStream* product at issue.
15
16

17 Dated: July 20, 2022
18
19

Respectfully Submitted,

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PLAINTIFF'S NOTICE OF MOTION AND MOTION TO COMPEL RESPONSES TO SUBPOENAS

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2022, I served a full, true and correct copy of the foregoing **MOTION TO COMPEL RESPONSES TO SUBPOENAS DUCES TECUM** via first class mail on the following parties:

Element Santa Fe Springs
9240 Santa Fe Springs Road
Santa Fe, CA 90670

S&N Labs
2021 E. Fourth Street, Suite 112
Santa Ana, CA 92705

/s/ Rob L. Phillips
Employee, FisherBroyles, LLP

I hereby certify that on July 20, 2022, I served a full, true and correct copy of the foregoing **MOTION TO COMPEL RESPONSES TO SUBPOENAS DUCES TECUM** via email on the following parties:

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